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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

135

FILE:

EAC 03 161 50113

Office: VERMONT SERVICE CENTER

Date: JUN 29 2006

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

S Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the petition for a new decision. The director has again denied the petition and, pursuant to the AAO's instructions, certified the decision to the AAO for review. The AAO will again withdraw the decision and remand the matter to the director.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a co-publisher and co-editor of the Arabic-language newspaper *Attawassul News*. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director initially found that the petitioner has not established that he qualifies as a member of the professions holding an advanced degree, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

The AAO withdrew the director's decision and remanded the petition on July 8, 2005, stating that the petitioner had not established eligibility, but that the director's decision was procedurally deficient and therefore the petitioner had not had a fair opportunity to remedy any shortcomings. The AAO instructed the director to make a finding as to whether or not the petitioner qualifies for classification as an alien of exceptional ability. The AAO also indicated that further discussion was necessary relating to the national interest waiver.

Section 203(b)(2)(A) of the Act makes visas available "to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States." Section 203(b)(2)(B) of the Act allows for a waiver of the job offer requirement "in the national interest."

Neither the statute nor the pertinent regulations define the term "national interest." Supplementary information published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), requires "a showing significantly above that necessary to prove the 'prospective national benefit'" that is required of aliens seeking to qualify as "exceptional."

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The inclusion of the term "prospective" is used here to require future contributions by the

alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.* at 219.

Pursuant to the AAO's remand order, the director issued a request for evidence on November 3, 2005. The issues raised in that notice largely echo concerns that the AAO discussed in its remand order. The petitioner, through counsel, responded to this notice, submitting statements from counsel and the petitioner, and copies of a small number of supporting documents. The director quoted from these materials in the latest decision.

The new decision is deficient both procedurally and substantively. Procedurally, the director did not issue a copy of the decision to the petitioner's attorney of record, although the attorney has twice submitted a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative. This may have prejudiced counsel's ability to take full advantage of the 30-day response period allowed for certified decisions.

Substantively, there are several flaws in the director's decision. In its first appellate decision, the AAO found that the director "did not give any consideration at all to whether the petitioner qualifies for classification as an alien of exceptional ability." The director's November 3, 2005 request for evidence deals with this issue; but in the latest decision, as in the first decision, the director makes no finding regarding whether or not the petitioner qualifies as an alien of exceptional ability. The director states that the petitioner seeks that classification, and the decision contains some discussion of the merits of that claim, but the director makes no actual finding.

The tone of the director's discussion seems to imply that the director does not believe that the petitioner qualifies for the classification. That would be a defensible finding, but the director must more clearly inform the petitioner of that finding, so that the petitioner has a fair opportunity to respond. Whatever the director finds regarding the classification, the director must set forth that finding in writing so that the AAO can consider that finding on certification. The petitioner's response to the request for evidence appears to contain sufficient information to allow the director to make an initial finding, which the AAO will then review on certification.

Regarding the petitioner's claim of eligibility for the national interest waiver, the director has focused almost exclusively on the fact that the petitioner supports himself by driving a taxicab, because his newspaper, *Attawassul News*, generates little or no income. The director found that the petitioner "is a full time taxi driver and his intended employment **is not** of intrinsic merit" (director's emphasis).

The AAO had already addressed this issue, stating: "The petitioner has not argued that his work as a taxicab driver forms the basis of his national interest waiver request." The petitioner's *intended* employment is as the publisher/editor of *Attawassul News*; he has indicated that he drives a taxicab out of economic necessity. The question of whether or not the petitioner's intentions are realistic is a relevant issue, but a separate one. The petitioner *intends* for his primary occupation to be newspaper publishing, which is a field with substantial intrinsic merit. We hereby withdraw the director's finding to the contrary.

With respect to the remaining prongs of the national interest test, the director has simply stated that the petitioner "submitted no evidence." The director has not discussed the petitioner's claims regarding how his newspaper is said to serve the national interest.

The director observed that the petitioner's newspaper is infrequently published and does not appear to be economically self-sustaining. The director did not address the impact that the paper has (or has not) had thus far.

It does not appear that an additional request for evidence is necessary in this proceeding; the previous request for evidence was very detailed. Also, the petitioner's response to that notice contains ample information upon which to base a decision. The deficiency, rather, is in the wording of the certified decision, which offers the petitioner little guidance as to why his petition has been denied.

Therefore, this matter will again be remanded for the issuance of a new decision that addresses the petitioner's most recent submission. A copy shall be provided to the petitioner's attorney of record unless the director has received written notice of the attorney's withdrawal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, regardless of the outcome, is to be certified to the Administrative Appeals Office for review.